

SYNOPSIS

**WITHHOLDING TAX -- LIABILITY FOR “MONEY PENALTY” (TAX)
AS A PERSON “REQUIRED” TO COLLECT, ACCOUNT FOR, AND PAY
OVER TRUST FUND TAX ON BEHALF OF CORPORATION AND WHO
“WILLFULLY” FAILED TO DO SO** -- Under W. Va. Code § 11-10-19(a) [1978], a person is liable, jointly and severally, for a civil “money penalty” (tax, excluding interest and additions) for 100% of an unpaid withholding tax obligation of a corporation if (1) he or she was “required” to collect, account for, and pay over such a trust fund tax on behalf of the corporation, and (2) if he or she “willfully” failed truthfully to perform these responsibilities on behalf of the corporation.

A person was “required” to collect, account for and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], if he or she, at the time the tax filing and payment were due, had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation.

The term “willfully” failed truthfully to collect, account for, and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], means that the person in question knowingly or recklessly failed truthfully to collect, account for, and pay over the withholding tax. That is, the person in question, prior to the money penalty tax assessment against him or her, had actual knowledge of the corporation’s default with respect to the withholding tax or recklessly ignored obvious financial facts which, with only a cursory inquiry, would have revealed that default.

FINAL DECISION

On May 15, 2003, the Internal Auditing Compliance Division of the West Virginia State Tax Commissioner’s Office issued a withholding tax “money penalty” assessment against the Petitioner, as a person responsible on behalf of a corporation, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code. This assessment was for the period of October 1, 1999, through December 31, 1999, for a “money penalty” (tax) and total assessed withholding tax liability. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked July 7, 2003, received by this tribunal, the West Virginia Office of Tax Appeals, on July 8, 2003, the Petitioner timely filed a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. During the period involved in the assessment, the Petitioner, was listed as the Vice-President and Secretary of the corporation in the official corporation records maintained by the Office of the West Virginia Secretary of State. *See* State's Exhibit No. 7.

2. The Petitioner was also listed as an Incorporator of the corporation in the official corporation records maintained by the Office of the West Virginia Secretary of State. *See* State's Exhibit No. 7.

3. As evidenced by her signature on each of the forms, the Petitioner undertook the responsibility for filing the "Employer's Return of West Virginia Income Tax Withheld," Forms WV/IT-101, for each of the months between January 1, 1999, and September 30, 1999, periods for which the amounts withheld from the employees' wages were paid to the State Tax Commissioner. *See* State's Exhibit No. 6.

4. As evidenced by her signature on five checks by which the corporation remitted employee withholding tax for the months of May, June and August of 1999, the Petitioner undertook the responsibility to pay over to the Tax Commissioner the amounts withheld by the corporation from the wages of its employees for those periods. *See* State's Exhibit No. 6.

5. As evidenced by her signature on each of the forms, the Petitioner undertook the responsibility for filing the “Employer’s Return of West Virginia Income Tax Withheld,” Forms WV/IT-101, for each of the months between October 1, 1999, and December 31, 1999, the periods for which there was no remittance of the amounts withheld by the corporation from the wages of its employees for those periods. *See* State’s Exhibit No. 5.

6. The Petitioner testified that the corporation was placed in involuntary bankruptcy by certain of its creditors, and that the corporation has not been discharged from bankruptcy.

7. She further testified that the bankruptcy trustee has in his possession cash in an amount that is more than sufficient to satisfy the amount of the corporation’s liability for withholding taxes that were not paid and which the subject of the assessment, and that the State Tax Commissioner should look to the corporation for payment of the amount assessed against her.

8. The Petitioner was the Vice-President and Secretary of the corporation, had authority to sign returns on behalf of the corporation, and was apparently one of the individuals involved with the day-to-day financial affairs of the corporation but, in that capacity, failed to see that the corporation paid these particular trust fund debts, and that these trust fund debts are not dischargeable in any bankruptcy proceedings.

9. In addition, prior to the withholding tax money penalty assessment against her, the Petitioner was aware of the default of the corporation with respect to its withholding tax liabilities but failed to see that the corporation paid these particular trust fund debts, and the financial conditions were such that the Petitioner recklessly failed to detect the easily discoverable withholding tax default by the corporation.

10. Applying withholding tax substantive and procedural law, as discussed below, to the evidence in this matter, the West Virginia Office of Tax Appeals finds that (1) the Petitioner has not satisfied her burden of proving that she was not one of the persons “required” to collect, account for, and pay over the withholding tax on behalf of the corporation, and finds that (2) the Petitioner has not shown that she did not “willfully” fail truthfully to perform these duties.

DISCUSSION

With respect to withholding tax, the issue is whether the Petitioner is one of the individuals who is personally responsible for all or any portion of the unpaid withholding tax liability of the corporation for the period periods involved in the assessment of that tax in this matter.

An employer is liable for withholding taxes withheld from employees’ wages but not remitted, W. Va. Code § 11-21-75 [1990]. Amount withheld from the pay of employees for the purpose of paying those employees’ income taxes to the State of West Virginia, are trust fund moneys belonging to the West Virginia State Tax Commissioner. W. Va. Code § 11-10-5j [1986].

The West Virginia Tax Procedure and Administration Act, specifically, W. Va. Code § 11-10-19(a) [1978], provides (in relevant part) as follows:

Any person required to collect, account for and pay over any tax administered under this article, who willfully fails truthfully to account for and pay over such tax, and person who willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall . . . be liable for a money penalty equal to the total amount evaded, or not collected, or not accounted for and paid over.

(emphasis added) For purposes of the West Virginia Tax Procedure and Administration Act, a “person” is defined by W. Va. Code § 11-10-4(b) [1979] to include a “corporation

. . . and also any officer, employee or member [thereof] . . . who, as such officer, employee or member, is under a duty to perform or is responsible for the performance of an act prescribed by the provisions of this article[.]” The question, then, is which persons are responsible for collecting, accounting for, and paying over a corporation’s withholding tax liabilities.

W. Va. Code § 11-10-19(a) [1978], *supra*, is derived from and is virtually identical to section 6672(a) of the Internal Revenue Code of 1986 (and its predecessors). *See also* Treas.Reg. § 301. 6672-1 (1986). Therefore, precedents deciding issues under that federal tax provision are very persuasive in deciding the same issues under W. Va. Code § 11-10-19(a) [1978].

Generally, a “person required” to collect, account for, and pay over a withholding tax, for purposes of Internal Revenue Code § 6672(a) -- and, therefore, for purposes of W. Va. Code § 11-10-19(a) [1978] -- is any person who had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, such as deciding which corporate debts, including taxes, would be paid. *See, e.g., O’Connor v. United States*, 956 F.2d 48 (4th Cir. 1992); *Johnson v. United States*, 833 F. Supp. 579 (S.D. W. Va. 1993) (Faber, J.).

Under Internal Revenue Code § 6672(a), and, therefore, under W. Va. Code § 11-10-19(a) [1978], the “willful” failure to prevent or to correct the corporation’s withholding tax default is usually the key element in deciding who is personally liable for that default. In the context of these civil penalty statutes, the term “willful” failure to collect, account for, and pay over a withholding tax does not require a criminal intent, such as an evil motive to defraud. On the other hand, these statutes require more than a

negligent failure to collect, account for, and pay over the tax. Instead, the person in question must knowingly or recklessly fail to collect, account for, and pay over the withholding tax. *See, e.g., Turpin v. United States*, 970 F.2d 1344 (4th Cir. 1992); *Johnson v. United States*, 833 F. Supp. 579 (S.D. W. Va. 1993).

In addition to the foregoing substantive law, the relevant procedural law is that, in a hearing on a petition for reassessment, the burden of proof is upon the person assessed to show that the assessment is incorrect and contrary to law, in whole or in part. *See W. Va. Code § 11-10A-10(e)* [2002].

At the hearing, the Petitioner did not present any evidence to show that the corporation paid the withholding tax liability out of the corporation's assets, currently in the hands of the bankruptcy trustee. Since the date of the hearing, the Petitioner has not presented any evidence to show that the withholding tax liability was paid out of the corporation's assets, currently in the hands of the bankruptcy trustee, subsequent to the hearing. If, however, the withholding tax liability has been paid out of the corporation's assets, then the Petitioner is not liable under the assessment.

CONCLUSIONS OF LAW

1. Under W. Va. Code § 11-10-19(a) [1978], a person is liable, jointly and severally, for a civil "money penalty" (tax, excluding interest and additions) for 100% of an unpaid withholding tax obligation of a corporation if (1) if he or she was "required" to collect, account for, and pay over such a trust fund tax on behalf of the corporation and (2) if he or she "willfully" failed truthfully to perform these responsibilities on behalf of the corporation.

2. A person was “required” to collect, account for, and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], if he or she, at the time the tax filing and payment were due, had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation.

3. The term “willfully” failed truthfully to collect, account for, and pay over the withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], means that the person in question knowingly or recklessly failed truthfully to collect, account for, and pay over the withholding tax. That is, the person in question, prior to the withholding tax money penalty assessment against him or her, had actual knowledge of the corporation’s default with respect to the withholding tax or recklessly ignored obvious financial facts which, with only a cursory inquiry, would have revealed that default.

4. The Petitioner is personally liable for the unpaid withholding tax liability of the corporation for the period involved in the assessment of that tax in this matter. She was “required” to collect, account for, and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], and she also “willfully” failed truthfully to collect, account for, and pay over the withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978]. The Petitioner is jointly and severally liable along with the corporation, and any other person responsible for this tax.

5. If the withholding tax liability has been paid out of the corporation’s assets subsequent to the date of the hearing, then the Petitioner is not liable for the assessment.

DISPOSITION

WHEREFORE, it is the **DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the withholding tax money penalty assessment issued against the Petitioner for the years period of October 1, 1999, through December 31, 1999, for tax, excluding interest and additions, should be and is hereby **AFFIRMED**.